90-20

No. _____

In The

Supreme Court of the United States

October Term, 1989

STATE OF HAWAII,

Petitioner,

v.

JOHN KALANI LINCOLN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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QUESTIONS PRESENTED

1. Whether, under *Ohio v. Roberts*, 448 U.S. 56 (1980), and its progeny, the court below erred in reversing Respondent's murder conviction on the ground that the admission, at Respondent's second murder trial, of prior cross-examined testimony from Respondent's first murder trial, violated Respondent's rights under the Confrontation Clause and the Fourteenth Amendment because, in the court's view, the earlier testimony was (a) rendered unreliable by evidence that the admitted testimony had been recanted and (b) this asserted unreliability was not (i) overcome, for purposes of admissibility, or (ii) cured by cross-examined testimony proving that the recantation was false, other rulings permitting impeachment of the prior testimony, and cautionary instructions concerning the testimony's reliability?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

Petitioner State of of Hawaii respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Hawaii entered in this action on March 8, 1990, as modified by the order entered below on March 29, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 789 P.2d 497 (Haw. 1990), and is reprinted in Appendix "A." The oral ruling of the Circuit Court of the Second Circuit, State of Hawaii, admitting the testimony of Anthony Kekona, Jr., at Respondent's second trial for

murder, entered January 26, 1990, is reprinted in Appendix "E." Other orders related to the case, and the mandate, are reprinted in Appendices "B," "C," and "D."

JURISDICTION

The opinion of the Supreme Court of Hawaii was entered on March 8, 1990, and an order granting in part and denying in relevant part Petitioner State of Hawaii's motion for reconsideration was entered on March 29, 1990. An order denying Respondent's motion for reconsideration filed March 29, 1990, was entered on April 6, 1990, along with the court's mandate. Under 28 U.S.C. § 2101, and this Court's Rule 13, the time in which this Petition may be filed extends at least to and including June 27, 1990, and this Petition was timely filed. Although the judgment permits the State to retry Respondent, the judgment is final for purposes of this Court's jurisdiction. *See, e.g., New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

The grounds for reversal presented here were timely presented to the Supreme Court of Hawaii in the State's Answering Brief on appeal at 29, 37-49, No. 13771 (Haw. Oct. 4, 1989), and in the memorandum in support of the State's Motion for Reconsideration and Clarification at 6-20, No. 13771 (Haw. Mar. 19, 1990), or were otherwise passed upon by the Supreme Court of Hawaii. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 217-23 (1983). The State Supreme Court also did not provide "a plain statement that the decision below rested on an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032,

1044 (1983). The manner in which the issues here were raised or passed upon by the state courts, and the propriety of federal review under the rule of *Michigan v. Long*, are briefed more fully at pp. 8-9, 10-11, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (West 1989).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The issue in this case is whether the Confrontation Clause was violated by the admission, in a criminal case, of concededly otherwise admissible cross-examined prior testimony because there is some evidence that the testimony has been recanted.

Here, the Supreme Court of Hawaii, based upon hitman Anthony Kekona's 1982 naked out-of court statements that he "lied" in his detailed testimony at John

Kalani Lincoln's first trial for the murder of Paul Warford, held that Kekona's 1980 testimony was so "unreliable" that it could not be used at Lincoln's second murder trial. The court did so even though Kekona, under oath in 1984, and on cross-examination, freely admitted that the recantation was false and was simply a ruse to win a trip home from the federal penitentiary in Lewisburg, Pennsylvania, to the island of Maui. The issue in this case is whether, despite the extensive steps taken to avoid prejudice to Lincoln's confrontation rights, the Supreme Court of Hawaii, by erecting a virtually insurmountable presumption of unreliability in cases involving allegations of recantation, was right in holding that admission of Kekona's past testimony would amount to a "mechanistic application of the hearsay exceptions" and thus improper under federal caselaw construing the right of confrontation.

1. This case arises out of the brutal shooting, on May 4, 1978, of Paul Warford, David Blue, and Harriet Savage, by Anthony Kekona, Jr., at the Kaleialoha Condominium in Honokowai, Maui. Warford and Blue died from the shooting. Savage, who lived, testified that Kekona, on the night of the slayings, said he was "paid to do this," and Kekona, after being arrested along with an accomplice, Patrick Hawkins, and pleading guilty to murder and attempted murder, implicated Respondent John Kalani Lincoln as the middleman in a chilling murder-for-hire scheme in which, the State's evidence showed below, Lincoln hired Kekona to kill Paul Warford at the behest of Warford's wife, Sue. At the time of the killings, Sue was the beneficiary of nearly four hundred thousand dollars in insurance policies on Paul Warford's life, and was having an affair with Ike Sanga, a Honolulu police officer

to whom Respondent Lincoln was related, and with whom Lincoln had been associated. *See* Pet. App. at 2-3; Tr. 1-23-89 at 64-65 (Savage test.); Tr. 1-30-89 at 85 (Sanga test.); Tr. 1-31-89 at 17 (Connors test.).

2. During Lincoln's 1980 trial on two counts of murder and one count of attempted murder, Kekona testified in detail to Lincoln's involvement in the "hit," involvement that was confirmed by telephone toll records linking Kekona to Lincoln in the spring of 1978, two different confessions Lincoln made to Maui police, in which Lincoln stated, in effect, that he regretted the death of David Blue and the near death of Harriet Savage, and that "my deal" or "trip" was "with Warford," as well as other admissions on taped conversations with Kekona, after Kekona had been captured, in which Lincoln admitted that those higher up in the plot were "family." *See State v. Lincoln*, 3 Haw. App. 107, 111 n.1, 113 n.4, 116 (1982).

3. Kekona's 1980 trial testimony, viewed favorably to the state, established that Lincoln agreed to pay Kekona $10,000 to kill Warford, Blue, and Savage (Tr. 4-1-80 at 444), the timing of the contract (*id.* at 445), and that Lincoln had come to Maui toward the end of April, gave Kekona pictures of Warford, Blue, and Savage (*id* at 447-48, 453), showed Kekona the layout of the Kaleialoha apartments (*id.* at 448-49), and plotted Kekona's route of escape (*id.* at 449). Kekona testified that Lincoln drew a map for the "hit" (*id.* at 450), gave Kekona "a week" to prepare for it (*id.* at 450), and promised Kekona that he would "take care" of bail and not only provide "one lawyer" if Kekona were caught, but kill any witnesses to the crime (*id.* at 451). Kekona testified, further, that, at the

initial Maui meeting, Lincoln paid Kekona one or two thousand dollars in $100 bills, out of which Kekona paid $500 to Hawkins (*id.* at 451, 454). Kekona confirmed that he placed a collect call to Lincoln's Oahu home on May 5, 1978, to inform Lincoln that "the job is done" and "I did what you told me to do" and "I think I going to get caught" (*id.* at 456). Kekona also testified that Lincoln encouraged Kekona to fly to Oahu to facilitate his escape from the Hawaiian Islands, and that Lincoln, first at Kekona's ex-wife's residence, and then at another of Lincoln's relatives', gave Kekona about $5200 in further payment for the "hit" (*id.* at 459). Kekona confirmed the basis of his cooperation leading to the tape recording of Lincoln's statements in 1979, and said that he kept silent until his trial because he expected Lincoln to kill the witnesses (*id.* at 456) and hire Kekona counsel (*id.* at 474). During this testimony, Lincoln was subjected to cross-examination exceeding 100 pages of transcript (*id.* at 476-572, 600-09). Based on the evidence at the first trial, a jury sitting in the Circuit Court for the Second Circuit, State of Hawaii, found Lincoln guilty of the murder of Paul Warford and David Blue, and of the attempted murder of Harriet Savage. The Hawaii Intermediate Court of Appeals affirmed, *State v. Lincoln*, 3 Haw. App. 107, 643 P.2d 807 (*"Lincoln I"*), and discretionary review was denied by the Supreme Court of Hawaii. *See* 64 Haw. 689 (1982).

4. On August 18, 1987, the United States District Court for the District of Hawaii issued a conditional writ of habeas corpus on the basis that the prosecutor at Lincoln's 1980 trial had made improper prejudicial references to Lincoln's refusal to take the stand in his own

defense. *Lincoln v. Sunn*, 674 F. Supp. 788, 791 (D. Haw. 1987). In the meantime, in November, 1982, Kekona, then incarcerated in the United States Penitentiary at Lewisburg, Pennsylvania, had made out an affidavit in which he "reaffirmed" as "true and correct" a previous conversation he had with Lincoln's counsel, in which he stated that Lincoln was not involved in the "hit thing," but instead was involved only in dealing marijuana. *See* Pet. App. "G." This affidavit led Kekona in 1984 to be recalled to Maui to a state proceeding seeking postconviction relief, at which time Kekona took the stand and recanted his recantation, stating, among other things, that the recantation was "a lie" and a way "to come home, you know, to see my parents" Pet. App. 30. At the 1984 postconviction proceeding, Kekona's retraction and his retraction of the retraction were subjected to extensive cross-examination (*id.* at 21-41), and relief was denied.

5. At Respondent's second trial for the murders of Paul Warford and David Blue, and the attempted murder of Harriet Savage, in January 1989, the Circuit Court for the Second Circuit, State of Hawaii, admitted Kekona's 1980 testimony after Kekona refused to testify following the Court's order so directing. Pet. App. 4. Noting that Kekona's counsel at the 1980 trial "had full opportunity to cross-examine Mr. Kekona," the trial court found the hearsay evidence admissible under the prior testimony exception set forth at Rule 804(a)(2), Haw. R. Evid., and "further[,] that the constitutional requirement as set forth in the United States Supreme Court cases on this subject had been satisfied." *See* Pet. App. "E." The trial court granted the defense virtual unlimited leeway in allowing impeachment of Kekona's 1980 testimony (*see, e.g.* Tr.

2-1-89 at 4-5 (allowing 1982 retraction to be admitted)), and issued an instruction advising the jury to view Kekona's original testimony with caution in light of Kekona's refusal to testify (Tr. 2-2-89 at 9-10). The court, over Lincoln's objection, admitted Kekona's 1984 cross-examined testimony bearing on the retraction of the retraction. *See* Pet. App. 21-41. An enormous array of interlocking evidence substantiating Lincoln's involvement and the veracity of Kekona's 1980 and 1984 testimony was presented in the three week trial. *See* State's Ans. Br. at 10-28, No. 13771 (Haw. Oct. 4, 1989). The jury, after several days' deliberation, returned acquittals on the charges involving David Blue and Harriet Savage, but convicted Lincoln as an accomplice in the murder of Paul Warford. Lincoln then appealed. *See* Pet. App. 3-4.

6. The Supreme Court of Hawaii reversed, concluding that the admission of Kekona's 1980 trial testimony "violate[d] Lincoln's constitutional right to confront his accuser." Pet. App. at 9. Arguing the Confrontation Clause issue was controlled by *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Mancusi v. Stubbs*, 408 U.S. 204 (1972)), the State had objected vigorously to reversal on confrontation grounds, as *Roberts* stated that, once, as here, unavailability has been shown, and " 'a hearsay declarant is not present for cross-examination at trial,' " prior statements can be admitted if " 'the evidence falls within a firmly rooted hearsay exception,' " including, specifically, " 'cross-examined prior-trial testimony.' " State's Answering Br. at 47, No. 13771 (Haw. Oct. 4, 1989) (*quoting Roberts*, 448 U.S. at 66 & n.8). The State vigorously contended that "[t]his case does not involve the issue of 'de minimus questioning' (*id.* (quoting *Roberts*)), and asserted

that vacatur would "reverse the Roberts analytic by allowing the unqualified inference of reliability for past cross-examined testimony to be 'rebutted' " (*id.*). The State also demonstrated that it was fully fair to permit the jury to weigh the credibility of Kekona's testimony, insofar as Lincoln "was permitted to introduce all of Kekona's subsequent statements . . . and to argue these evidentiary points" (*id.* at 42). Reasoning that no amount of protective measures would suffice, and that "the prior cross-examination of Kekona was rendered inadequate by subsequent events" the Supreme Court of Hawaii held that admission of Kekona's 1980 testimony was impermissible under this Court's precedents as a "mechanistic application of the hearsay exceptions" (Pet. App. 9), and viewed the case as similar to *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), in which uncross-examined grand jury testimony was excluded because it was deemed unreliable. Pet. App. at 8. The Court subsequently denied in relevant part the State's timely motion for reconsideration, although it permitted the State to retry Lincoln in light of its novel ruling. Pet. App. at 11.

REASONS FOR GRANTING THE WRIT

The judgment below does not rest upon an independent and adequate state ground and creates a gaping exception to the reasoning and logic of this Court's confrontation clause jurisprudence that merits review and reversal by this Court. Taken seriously, the Supreme Court of Hawaii's expansive reading of the reliability component of this Court's two-part test in *Ohio v. Roberts*, 448 U.S. 56 (1980), would make any instance in which a

live witness refused to testify impossible to rectify through the admission of the witness's past testimony, as the refusal of the witness to testify, like Kekona's post-1980 statements, provides a "subsequent" ground for impeachment that, under the lower court's logic, would render the "prior cross-examination" "inadequate." *See* Pet. App. at 8. This could not be the law. Because the ruling below is within this Court's authority to correct and presents a direct conflict with this Court's precedents, or, at the least, substantial questions that merit the Court's attention, the petition for review should be granted.

A. The Judgment Below Does Not Rest Upon an Independent and Adequate State Ground.

In seeking review here of the judgment below vacating Respondent's conviction for murder in one of Hawaii's most notorious crimes, Petitioner appreciates that this Court's first task is "to 'satisfy itself . . . of its own jurisdiction.' " *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). We are thus aware of, and subscribe to, the rule that this Court does not have jurisdiction over a state court decision that "rests on an adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032 (1983) (per curiam). Since *Long*, however, this Court has held that dismissal is not required unless the ruling under review embodies "a 'plain statement' of the court's reliance on an alternative state-law holding." *Quinn v. Millsap*, 109 S. Ct. 2324, 2329 n.6 (1989). Although the state court below cited to the Hawaii Constitution in vacating Respondent's conviction (Pet. App.

2), properly construed, the judgment is amenable to this Court's corrective power.

Here, as in *Michigan v. Long* itself, the judgment below that Respondent's confrontation rights were violated is "interwoven with the federal law." 463 U.S. at 1040. Indeed, in its critical holding that affirmance would constitute an impermissible "mechanistic application of the hearsay exceptions" (Pet App. 9), the court cited to this Court's ruling in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and purported to follow the Sixth Circuit's lead in *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982). Nothing in the opinion below, or in the two Hawaii cases it cites, *State v. Kim*, 55 Haw. 346, 519 P.2d 1241 (1974), and *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697 (1973), indicate, either as a general matter, or, in this context, that the Hawaii Constitution's confrontation clause, which in relevant part is identical to the Sixth Amendment (*see* Haw. Const. art. I, § 14), is construed more broadly than its federal counterpart, and, indeed, the court's analysis signifies that, on this front, the Hawaii constitutional provision "is construed in pari materia with the [Sixth] Amendment." *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987). Jurisdiction lies here.

B. Review Should be Granted to Correct the Supreme Court of Hawaii's Expansive Reading of the Reliability Component of this Court's Confrontation Jurisprudence.

Contrary to the judgment of the Supreme Court of Hawaii, the "prior cross-examination of Kekona" was not "rendered inadequate by subsequent events" for Confrontation Clause purposes.

Indeed, in condemning a "mechanistic" result, the Supreme Court of Hawaii created one in allowing exclusion of otherwise admissible hearsay whenever "subsequent events" give rise to new grounds for impeachment that cannot be exploited before the jury by live testimony because of a witness's recalcitrance.

Permitted to stand, the lower court's analysis would require suppression of vast categories of admissible proof that fall within the "firmly rooted hearsay exception[s]" that this Court has repeatedly held comport with the intent and purpose of the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. at 66.

In this case, there is no doubt that the well established exception for "cross-examined prior-trial testimony," *id.* at 66 n.8 (citing *Mancusi v. Stubbs*, 408 U.S. 204, 213-16 (1972)), was in play. As in *California v. Green*, 399 U.S. 149 (1970), the witness became recalcitrant at trial, making him unavailable, and his prior testimony was offered. That testimony was subject to extensive cross-examination, consisting of more than 100 pages of trial transcript. Under any plausible reading of this Court's decisions in *Roberts*, *Mancusi*, and *Green*, admission of the evidence was an appropriate accommodation of the basic purpose of trials conducted under the Due Process Clause – the search for truth – with the distinct procedural interests protected by the Confrontation Clause. The Supreme Court of Hawaii took no exception with the trial court's finding that, as a matter of Hawaii evidence law, the requirements of the past-testimony exception were met, and, on these facts, this Court will "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Medical*

Center, 485 U.S. 80, 86 (1988); *see First English Lutheran Church v. Los Angeles County*, 482 U.S. 304, 314 n.8 (1987).

The ground relied upon below, that subsequent events may generate post-hoc grounds for challenging the adequacy of past cross-examination, is squarely foreclosed by this Court's precedents, or is sufficiently in conflict with the logic of those decisions so as to counsel review. Indeed, seen clearly, the judgment below imposes the burden of "undertak[ing] a particularized search for 'indicia of reliability' " in precisely those cases in which such searches have been ruled unnecessary. *Roberts*, 448 U.S. at 66, 72; *see Mancusi*, 408 U.S. at 213-16. As the State vigorously urged below, whether Kekona's past testimony could support a conviction went to weight, not admissibility, and while Lincoln clearly had a due process interest in placing before the jury the evidence of Kekona's recantation, that interest was clearly satisfied by the Circuit Court's generous rulings and instructions that Kekona's past testimony, in light of his subsequent actions, should be viewed cautiously.

Indeed, even on its own view that a fact-specific analysis of the "indicia of reliability" was counseled, the Supreme Court of Hawaii erected an insurmountable and arbitrary burden for the State that overlooked a central purpose behind this Court's contemporary construction of the Confrontation Clause: "the need for certainty in the workaday world of conducting criminal trials." *Roberts*, 448 U.S. at 66. While citing to the fact that Kekona's retraction of his 1980 testimony was possibly motivated by "a desire to receive a free trip back to Hawaii from his mainland prison" (Pet. App. 8), the Court did not state how this factor cutting in favor of the reliability of the

1980 testimony should be weighed, or when, if ever, a witness's "subsequent" recalcitrance could ever be ignored when, as is always logically possible, the witness's desire to avoid live testimony leads to the conclusion that the witness did not believe his former testimony was fully truthful. Here, of course, Kekona's retraction *was* the subject of cross-examination at Respondent's 1984 state habeas proceeding, and this testimony (ironically, over Respondent's objection), *was* read to the jury. *See* Pet. App. 21-41. In light of this fact, the decision below amounts to the very sort of "mechanistic" result that the Supreme Court of Hawaii purported to condemn, for no matter how thoroughly, as a whole, Kekona's statements were cross-examined, the court's analysis dictates inadmissibility.

As this Court has repeatedly held, the jurisprudence that has grown up around the Confrontation Clause has "attempted to harmonize the goal of the Clause – placing limits on the kind of evidence that may be received against a defendant – with a societal interest in accurate factfinding." *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). Indeed, as the Court emphasized in *Bourjaily*, "no independent inquiry into reliability is required when the evidence 'falls within a firmly rooted hearsay exception.' " *Id.* at 183. Here, in eroding nearly a century of precedent recognizing the "former testimony" hearsay exception, *see Mattox v. United States*, 156 U.S. 237 (1895), the Supreme Court of Hawaii fundamentally breached this teaching, and erected a virtually conclusive presumption of unreliability in cases of witness recalcitrance. This decision turns this Court's Confrontation Clause jurisprudence on its head.

Because of the conflict between this far-reaching decision and this Court's precedents, review should be granted.

CONCLUSION

For the reasons above, the Court should grant the Petition and summarily reverse the judgment of the Supreme Court of Hawaii, or set the case down for plenary briefing and argument.

Respectfully submitted, June 27, 1990.

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APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
JOHN KALANI LINCOLN, Defendant-Appellant.

NO. 13771

APPEAL FROM THE SECOND CIRCUIT COURT
HONORABLE E. JOHN McCONNELL, JUDGE
(CRIM. NO. 5720(1))

MARCH 8, 1990
(Filed March 8, 1990)

LUM, C.J., HAYASHI, WAKATSUKI, JJ.,
RETIRED JUSTICE NAKAMURA ASSIGNED BY
REASON OF VACANCY, AND INTERMEDIATE
COURT OF APPEALS JUDGE HEEN,
IN PLACE OF PADGETT, J., RECUSED

CRIMINAL LAW – evidence – hearsay – Hawaii Rules of Evidence 804(b)(1).

The mechanistic application of hearsay exceptions is inappropriate where former testimony lacks indicia of reliability usually associated with sworn testimony.

CONSTITUTIONAL LAW – confrontation.

To allow the admission of former testimony by a now unavailable witness under Hawaii Rules of Evidence 804(b)(1) which lacks the indicia of reliability usually associated with sworn testimony violates a defendant's right under the Hawaii Constitution to confront his accuser as to subsequent events which have rendered that testimony unreliable.

OPINION OF THE COURT BY LUM, C.J.

This appeal stems from a retrial of Appellant John Kalani Lincoln ordered by the Federal District Court. Lincoln appeals from his new conviction of murder in violation of Hawaii Revised Statutes (HRS) §§ 707-701, 707-221, and 702-222.

Lincoln alleges numerous points of error in his appeal. We need to address only one, which is whether the trial court committed reversible error when it admitted into evidence the former testimony given in Lincoln's first trial by the trigger man in the shooting, Anthony Kekona, Jr., after the trial court found that Kekona was unavailable as a witness under Hawaii Rules of Evidence (HRE) 804 when Kekona refused to testify. Because we find that Kekona's former testimony lacked the necessary indicia of reliability and because Lincoln's rights under the Confrontation Clause of the Hawaii Constitution have been violated, we reverse.

I.

On May 4, 1978, Anthony Kekona, Jr., and Patrick Hawkins went to the Kaleialoha Condominium in Honokowai, Maui, where Kekona shot and killed Paul Warford and David Blue and shot Harriet Savage in the head wounding her severely. Hawkins, who had provided the gun Kekona used, was arrested almost immediately. Kekona was arrested several days later on Oahu.

Kekona pled guilty on two counts of murder and one count of attempted murder for which he was sentenced, respectively, to life imprisonment with possibility of

parole and 20 years in prison. Hawkins pled guilty to three counts of attempted robbery for which he received five years probation.

The day after his sentencing in July 1979, Kekona told his uncle, Robert Cordero, a Maui police detective, that he had been hired by John Kalani Lincoln to kill Warford, Blue and Savage.

II.

A.

Thereafter Lincoln was indicted by the Grand Jury on two counts of "murder for hire" and one count of attempted murder. Both Hawkins and Kekona testified on behalf of the State against Lincoln. These testimonies were read to the jury in Lincoln's retrial and is the subject of this appeal.

On April 12, 1980, a jury found Lincoln guilty of the two murders and attempted murder. The jury did not find Lincoln guilty of "murder for hire." He was sentenced to life with parole and twenty years in prison respectively.

In late 1982, Anthony Kekona, in a sworn affidavit which stated that Lincoln had no connection with the shootings and that Kekona's only connection with Lincoln involved marijuana transactions, recanted his testimony given at Lincoln's trial. When a hearing was held on this recantation, Kekona recanted his recantation and claimed he only wanted a free trip back to Hawaii from prison on the mainland to see his family.

After the 1987 reversal of Lincoln's conviction by the Federal District Court, the State decided to retry Lincoln.

B.

Eventually, a new jury trial was held commencing January 17, 1989. Kekona refused to testify for the State. Kekona demanded new concessions from the State for further testimony and also claimed his privilege against self-incrimination after not being offered immunity. Hawkins was unavailable to testify for the State since his probation has expired and he had moved to the mainland. The State did try to produce Hawkins through the Uniform Act to Secure Attendance of Witness from Without the State in Criminal Proceedings.

The former testimony of Kekona was read to the jury. The jury was advised of his retraction and his retraction of his retraction. The court allowed the former testimony under HRE 804(a)(2).[1] Likewise, the court allowed the

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[1] Rule 804(a) states in pertinent part:

Rule 804 Hearsay exceptions; declarant unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on ground of privilege from testifying concerning the subject matter of his statement; or

(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of his statement; or

(Continued on following page)

former testimony of Hawkins under HRE 804(a)(5) but in this appeal we need not address that aspect of the court's ruling. Lincoln objected very strenuously to the admission of the former testimony of Kekona, citing the fact that Kekona's behavior in the intervening years had been such as to cast serious doubts on the reliability of his former testimony. Lincoln argues that Kekona's action subsequent to his prior testimony rendered the prior cross-examination of him inadequate to support the admission of the prior testimony, and Lincoln was deprived of his right of confrontation. We agree.

III.

We have previously held that the erroneous admission of evidence may constitute error if a fair trial was thereby impaired or if that evidence resulted in substantial prejudice to the Defendant. *State v. Cummings*, 49 Haw. 522, 528, 423 P.2d 438, 442 (1967). We must also determine whether the admission of such evidence was harmless beyond a reasonable doubt in order to decide the question of whether or not the admission of former testimony under a hearsay exception to the Hawaii Rules of Evidence violated Lincoln's constitutional right to

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(Continued from previous page)

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

confront his accuser. *State v. Pookini*, 57 Haw. 26, 548 P.2d 1402 (1976).

In the present case, the trial court found that both Kekona and Hawkins were unavailable and admitted their former testimony from the first trial which was read to the jury even though the State was not able to assure the trial court that Kekona's testimony at the second trial would have been substantially similar to that in the first if he did not choose to testify a second time. Kekona's recantation and recantation of the recantation were also made known to the jury but, of course, Lincoln's counsel was unable to cross-examine him on these matters.

Generally, former testimony is admissible as an exception to the hearsay rule. Since it was adduced under oath and the opposing party had the opportunity for full cross-examination, former testimony is thought to be reliable and acceptable when the declarant is unavailable. *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980) (reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception); *State v. White*, 65 Haw. 286, 651 P.2d 470 (1982). Criminal defendants have a basic constitutional right to confront their accusers under both the Hawaii and United States Constitutions.[2] Under HRE 804(b)(1), the proponent of former testimony must establish that the witness is unavailable and that his unavailability has not been procured by the party seeking to use his former testimony *and* that the opposing party had a sufficient reason, motive, and opportunity to cross-examine the

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[2] Haw. Const., art. I, § 14; U.S. Const. amend. VI.

witness at the former hearing.[3] Former testimony is thus admissible and does not violate the confrontation clause if this test is met. *Roberts, supra.*

Hawaii case law also allows the admission of former testimony, if the witness is unavailable. Generally, the introduction of prior testimony does not violate the Confrontation Clause if there is sufficient proof of the unavailability of the witness. *State v. Kim*, 55 Haw. 346, 519 P.2d 1241 (1974). Such testimony is admissible if the witness was under oath, the defendant and his attorney were present and had an opportunity to cross-examine the witness, the proceedings were before a judicial tribunal which recorded them properly, and the state was unable to procure the attendance of the witness after diligent efforts. *State v. Faafiti*, 54 Haw. 637, 513 P.2d 697 (1973).

We find that here Kekona's former testimony lacks reliability. Kekona retracted his testimony under oath, retracted his retraction, and finally refused to testify at trial. His motives are unclear but may have included,

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[3] Rule 804(b)(1) provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, at the instance of or against a party with opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

among other things, a desire to receive a free trip back to Hawaii from his mainland prison as well as an attempt to strike a better deal with the State. We also find that the prior cross-examination of Kekona was rendered inadequate by subsequent events.

There is a federal case which is analogous. In *United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982), the court set out a test for determining the reliability of former testimony given before a grand jury which was sought to be admitted under Federal Rules of Evidence 804(b)(5) (same as HRE 804(b)(6)).[4] Although there was no cross-examination before the grand jury, the testimony was given under oath.

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[4] HRE 804(b)(6) provides:

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(6) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (B) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

> [9] Second the trial court must determine whether the substance of the grand jury testimony possesses "circumstantial guarantees of trustworthiness" equivalent to the other exceptions included in Rule 804. In making this determination the trial court should consider the *declarant's relationship with both the defendant and the government, the declarant's motivation to testify* before the grand jury, the extent to which the testimony reflects the declarant's personal knowledge, *whether the declarant has ever recanted the testimony, and the existence of corroborating evidence available for cross-examination*. (Emphasis added).

Id. at 962.

We hold that the mechanistic application of the hearsay exceptions is inappropriate. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed. 2d 297 (1973).

The evidence against Lincoln is flimsy without the critical testimony of Kekona. Kekona's testimony was critical to the extent that we feel that, upon review of the record, its admission was not harmless beyond a reasonable doubt. To allow the former testimony which lacks the indicia of reliability usually associated with sworn testimony to be admitted in lieu of Kekona's live appearance violates Lincoln's constitutional right to confront his accuser as to subsequent events which have rendered Kekona's testimony unreliable.

Reversed.

Eric A. Seitz
for Defendant-Appellant

Steven S. Michaels
(John C. Bryant, Jr.,
with him on the brief),
Deputy Attorneys General
for Plaintiff-Appellee

/s/ H. Lum
/s/ Yoshimi Hayashi
/s/ J. Wakatsuki
/s/ Edward H. Nakamura
/s/ Walter M. Heen

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
JOHN KALANT LINCOLN, Defendant-Appellant.

NO. 13771

(CRIM. NO. 5720(1))

MOTION FOR RECONSIDERATION

MARCH 29, 1990

LUM, C.J., HAYASHI, WAKATSUKI, JJ.,
RETIRED JUSTICE NAKAMURA ASSIGNED BY
REASON OF VACANCY, AND INTERMEDIATE
COURT OF APPEALS JUDGE
HEEN, IN PLACE OF PADGETT, J., RECUSED

(Filed March 29, 1990)

Upon consideration of Plaintiff-Appellee's Motion for Reconsideration and Clarification of Opinion filed March 8, 1990,

IT IS HEREBY ORDERED that the motion is granted to the limited extent of amending the last paragraph of this court's opinion to read as follows:

Reversed and remanded for a new trial.

The clerk of the court is directed to incorporate the foregoing change in the original opinion.

In all other respects the motion for reconsideration is denied.

John C. Bryant, Jr.	/s/ H. Lum
Edwin L. Baker	/s/ Yoshimi Hayashi
Deputy Attorneys General	/s/ J. Wakatsuki
on the motion	/s/ Edward H. Nakamura
for Plaintiff-Appellee	/s/ Walter M. Heen

APPENDIX "C"

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, vs.
JOHN KALANT LINCOLN, Defendant-Appellant.

NO. 13771

(CRIM. NO. 5720(1))

MOTION FOR RECONSIDERATION
OF ORDER FILED MARCH 29, 1990

APRIL 6, 1990

LUM, C.J., HAYASHI, WAKATSUKI, JJ.,
RETIRED JUSTICE NAKAMURA ASSIGNED BY
REASON OF VACANCY, AND INTERMEDIATE
COURT OF APPEALS JUDGE
HEEN, IN PLACE OF PADGETT, J., RECUSED

Upon consideration of Defendant-Appellant's Motion for Reconsideration of Order Filed March 29, 1990,

IT IS HEREBY ORDERED that the motion is denied. This court declines to reach issues not specifically addressed in this court's opinion as issued on March 8, 1990, and modified on March 29, 1990.

Eric A. Seitz
on the motion
for Defendant-Appellant

/s/ H. Lum
/s/ Yoshimi Hayashi
/s/ J. Wakatsuki
/s/ Edward H. Nakamura
/s/ Walter M. Heen

APPENDIX "D"

NO. 13771

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1989

STATE OF HAWAII, Plaintiff-Appellee, vs. JOHN KALANI LINCOLN, Defendant-Appellant.	CR. NO. 5720(1) APPEAL FROM THE JUDGMENT FILED MARCH 15, 1989, AND THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL, FILED ON MARCH 30, 1989 SECOND CIRCUIT COURT HON. E. JOHN McCONNELL

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii entered herein on March 8, 1990, as amended, the Judgment, Conviction and Sentence of the Second Circuit Court filed herein on March 15, 1989 is reversed and remanded for a new trial.

DATED: Honolulu, Hawaii, April 6, 1990.

BY THE COURT

/s/ Sandra N. Yasui
CLERK

APPROVED:
/s/ H. Lum
JUSTICE

APPENDIX "E"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. JOHN KALANI LINCOLN, Defendant.	Criminal No. 5720 TRANSCRIPT OF PROCEEDINGS VOLUME XII

TRANSCRIPT OF PROCEEDINGS

before the Honorable E. JOHN McCONNELL, Circuit Court Judge presiding on Thursday, January 26, 1989. Continuation of Jury Trial.

APPEARANCES:

JOHN BRYANT, Esq.
Deputy Attorney General
426 Queen Street
Honolulu, Hawaii 96813
Attorney for the Plaintiff

ERIC SEITZ, Esq.
820 Mililani Street
Suite 714
Honolulu, Hawaii 96813
Attorney for the Defendant

REPORTED BY:

Beth Kelly, RPR, CSR 235
Official Court Reporter
State of Hawaii

[Material Deleted in printing]

(p. 19) THE COURT: Well, the Court's ruling that the witness is unavailable under Rule 804(a)(2) by reason of his refusal to testify, and further that the constitutional requirement as set forth in the United States Supreme Court cases on this subject has been satisfied. At the prior trial, of course, Mr. Seitz you had full opportunity to cross-examine Mr. Kekona. So, I will permit the reading of his prior testimony to the jury.

APPENDIX "F"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

STATE OF HAWAII, vs. JOHN KALANI LINCOLN, Defendant.	CRIMINAL NO. 5720 AFTERNOON SESSION

(p. 1) TRANSCRIPT OF PROCEEDINGS

before the Honorable E. JOHN MC CONNELL, Circuit Court Judge presiding, at Wailuku, Maui, Hawaii, on Wednesday, February 1, 1989.

APPEARANCES:

John Bryant, Esq.	For the State of Hawaii Deputy Attorney General
Dwight Nadamoto, Esq.	For the State of Hawaii Deputy Attorney General
Eric Seitz, Esq.	For the Defendant

REPORTED BY

Gloria T. Bediamol, RPR, CSR 262
Official Court Reporter
State of Hawaii

INDEX

ANTHONY KEKONA, JR. Prior testimony of a hearing held February 9, 1984 was given by virtue of a transcript.

(p. 3) THE COURT: The record will reflect we're reconvened in chambers. Mr. Bryant and Mr. Seitz are present, and the defendant's presence is waived.

MR. SEITZ: Yes.

THE COURT: We're out of the hearing of the jury. The Court has indicated, when we were in chambers yesterday, that it was inclined to admit the reading of a portion of the transcript of proceedings in the rule 40 proceeding. These proceedings occurred on February 4, 1984.

This evidence is offered by the State and is essentially Mr. Kekona's recantation of his recantation. I think Mr. Seitz made his record the last time we were in chambers, but is there anything to say?

MR. SEITZ: My objection is on two grounds: one is that this is a subsequent statement, which is offered, and there is no such thing as a subsequent statement that can be offered. Secondly, I did not have the opportunity to cross-examine Mr. Kekona at such length as I think would have been appropriate in a trial, because this was a rule 40 proceeding.

And I think therefore there are some issues as to the right of confrontation by allowing it in this proceeding.

THE COURT: The Court's feeling is that it's (p. 4) highly probative as to Mr. Kekona's credibility; and further, that although it is hearsay, it is admissible under the former testimony exception to the hearsay rule and in view of Mr. Kekona's unavailability.

For the record, the parties have gone over the transcript and have agreed that the following portions will be read: page 16 line 1 through page 26 line 22, and then page 39 line 18 through page 47 line 23.

MR. BRYANT: That's correct.

THE COURT: Also I understand the State wants to call one rebuttal witness, that being Lieutenant Danley; is that right?

MR. BRYANT: That's correct.

THE COURT: I ask for a brief offer of proof.

MR. BRYANT: Basically, he is going to deny making statements recounted by attorney James Paul, and he is going to be denying statements that the defendant testified that he met at Thanksgiving 1979. He will deny going passed Lahaina and buying beers for the defendant.

THE COURT: Okay anything else?

MR. SEITZ: No, the other matter we talked about before the reporter came in was whether my Exhibit B would be published to the jury, and I would like to put (p. 5) that on the record if we may.

MR. BRYANT: Well, I think my objection is on the record, and I do object to it.

THE COURT: Well, it is in evidence. I will receive it in evidence and permit it to go in with the others as exhibits.

MR. BRYANT: Can we go off the record?

(Discussion was held off the record.)

(Following proceedings were held in open court.)

THE COURT: Let the record reflect the presence of the jury and the defendant.

Mr. Bryant, your rebuttal case?

MR. BRYANT: Your Honor, the State would call Lieutenant Danley to the stand.

GARY DANLEY

called as a rebuttal witness by the State, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BRYANT:

Q. Lieutenant Danley, good afternoon, could you state your full name?

A. Gary G. Danley.

Q. Do you remember a James Paul, Lieutenant (p. 6) Danley?

A. Yes.

Q. Do you remember talking to him back in 1979?

A. Yes.

Q. Did you ever tell Paul that it made you physically sick that the other people involved in this hit were on the street?

A. No, I did not.

Q. Did you ever tell Paul that this defendant was not completely free of guilt?

A. No, I did not.

Q. Did you ever tell Paul that you hoped that he and Eric Seitz conducted a vigorous defense in this case?

A. No, I did not.

Q. Were you ever shown any transmitters by Paul?

A. No.

Q. Let me direct your attention to Thanksgiving 1979. Do you remember that day?

A. Yes.

Q. Did you ever tell the defendant that there were mountains of evidence against him?

A. No, I did not.

Q. Did you ever tell him that there was a (p. 7) contract out for him?

A. I believe I told Mr. Paul that there was a possiblity that his life was in danger.

Q. Did you ever tell the defendant that there was a contract out for his wife?

A. No, I did not.

Q. Let's switch back to November 8, 1979. This was the trip from Wailuku to Lahaina. Did you ever go passed the Lahaina police station and stop and buy beer for the defendant?

A. No, I did not.

Q. Would you ever do that for a prisoner in custody?

A. Never.

MR. BRYANT: Thank you, I have no further questions.

THE COURT: Any questions, Mr. Seitz?

MR. SEITZ: No questions.

THE COURT: You may step down, Lieutenant Danley.

MR. BRYANT: Your Honor at this time, the State would like to call Anthony Kekona to the stand by virtue of his prior testimony at a hearing on February 9, 1984.

THE COURT: Very well.

(p. 8) THE COURT: I assume that Mr. Nadamoto will be Mr. Kekona again.

MR. BRYANT: Yes, Your Honor.

THE COURT: Again, ladies and gentlemen, portions of prior testimony are to be read to you. You should consider them just as if they were being given live by Mr. Kekona himself.

MR. SEITZ: The record is clear we objected to this.

MR. BRYANT: This is direct examination by Mr. Seitz.

Q. Would you state your name for the record, please?

A. Anthony K. Kekona, Jr.

Q. And Mr. Kekona, you are a State prisoner, is that right?

A. That's right.

Q. Are you the same Anthony Kekona who testified in this courtroom in the criminal trial in 1980 involving John Lincoln?

A. That's right.

Q. Do you know Mr. Lincoln?

A. Yes, sir.

Q. Do you see Mr. Lincoln here?

A. Yes, sir, in the blue there.

(p. 9) Q. Mr. Kekona, I would like to show you what I've had – well, let me show the original, if I may. I'd like to show you a document which was attached to the Petition in this case. I believe it's in the Court's file. And let me ask you if your signature is on that document?

The Court states, all right. Mr. Kekona, I am going to hand to you a document that's entitled "Affidavit of Anthony Kekona, Jr." and at the bottom of the affidavit there is a signature. Can you tell me whether or not that is your signature?

A. That's my signature, sir.

The Court says, thank you.

Questions by Mr. Seitz.

Q. In regard to the signature which the judge has just shown you, at the time that you signed that particular document, did you do so in front of a notary public?

A. Yes, sir.

Q. And did you understand at that time that you signed your name to that particular document, that you were swearing that what was contained in that document was true and correct?

A. Yes.

Q. Mr. Kekona, I have a copy of that particular (p. 10) document, which I'd now like to hand to you, which has been marked as Exhibit 2 as previously been shown to opposing counsel in this case. May I approach the witness?

The Court indicates, all right, Mr. Kekona, I'm handing to you what is simply a copy, photocopy or xerox copy of the affidavit that I showed to you that's contained in the Court's file. I would ask you at this time whether or not that is a true and accurate copy of the original that is in the Court's file. You see that clearly enough?

A. Yes, sir that's right.

The Court, your answer would be yes?

A. Yes.

The Court says, thank you.

Questions by Mr. Seitz.

Q. Mr. Kekona, would you take a look at what the judge has there, which is marked as Exhibit 2. And do you see attached to Exhibit 2, two separate exhibits?

A. Yes.

Q. The first exhibit is a letter, is that correct?

A. That's correct.

Q. Do you recognize that letter?

A. Yes.

(p. 11) Q. Is your signature on that letter?

A. Yes, sir.

Q. Is that a copy, a true copy of the original letter which had your signature on it?

A. Yes, sir.

Q. Did you write that letter?

A. Yes, sir.

Q. And to whom is that letter addressed?

A. It's addressed to you.

Q. And did you address that letter to me?

A. Yes, sir, in Washington, D.C.

Q. Okay. You see a date on that particular letter?

A. October 31, 1982.

Q. Was that approximately a date upon which you addressed that particular letter to me?

A. That's right.

Q. Following – well, let me ask you, did you send that letter?

A. Yes, sir.

Q. Following the time that the letter was sent, did you and I have a meeting?

A. Yes, sir.

Q. Do you recall when that meeting occurred?

A. I forgot the date.

(p. 12) Q. All right, would you look at the second exhibit, which is attached to your affidavit. You recognize that second exhibit?

A. Okay. Yes, sir.

Q. What is that second exhibit?

A. November 6, 1:50.

Q. Okay. Was that when you and I had a meeting?

A. Yes.

Q. And you remember what year that was?

A. Um, 1982.

Q. Do you recognize the second exhibit which is attached to your affidavit, the typed exhibit?

A. Is that the second exhibit you're talking about?

Q. No, not the letter. The next page.

A. Okay.

Q. Yes.

A. Yes, sir.

Q. Have you seen that exhibit before?

A. Yes, sir.

Q. When did you see it?

A. I told you about 'em I seen 'em right now.

Q. But when did you first see that particular exhibit, do you recall?

(p. 13) A. This is the first time I seen this.

Q. Was that typewritten portion, that exhibit which is attached to your affidavit, was that attached to the original affidavit you signed?

A. I don't recall.

Q. Maybe we could show you the original affidavit and see if you remember if that document was attached to the original document which you've already said you signed.

The Court says, all right. Mr. Kekona, I am going to hand you the affidavit that I've already showed you. This is the one that you said –

A. Yeah. Okay. Okay.

THE COURT: I want you to look at the things that are attached to the Court's original affidavit. I'm

showing you Exhibit A, okay. And now I am showing you Exhibit B, which is a typewritten thing, a copy of which you have before you on State's Exhibit 2?

A. Okay.

The Court says, all right. Mr. Seitz.

Q. Was Exhibit B attached to the original affidavit that you signed?

A. That's right, sir.

Q. Do you know what Exhibit B is?

A. My statement.

(p. 14) Q. Okay. It's a transcript of a tape, is that right?

A. That's right.

Q. And do you recall when you met with me, that I had a tape recorder with me?

A. Yes.

Q. And do you recall that I told you that I would tape record the conversation?

A. That's right.

Q. When you signed this particular affidavit, which we've shown you, which has two exhibits attached to it, did you read the exhibits?

A. Yes.

Q. In your affidavit, a copy of which is in front of you, do you see paragraph number 2?

A. Is that the exhibit?

The Court said, what he's referring to is your affidavit.

MR. SEITZ: On the first page?

The Court says, is your affidavit, paragraph number 2.

Mr. Seitz says, okay.

The Court says, okay.

Question by Mr. Seitz, you see that?

A. Yes, sir.

(p. 15) Was that paragraph there when you signed the affidavit on November 16, 1982?

A. That's right.

Q. How about paragraph 3, do you remember paragraph 3 of your affidavit?

A. Yeah that's right.

Q. And what did you say in paragraph 3?

A. That you visited me in Lewisburg, Pennsylvania.

Q. And what else did it say?

A. In 1982, November 6.

Q. What is the last part of the sentence, say in that paragraph.

A. True and correct transcript of the conversations attached to my affidavit as Exhibit B.

Q. And you see paragraph 4 of your affidavit?

A. Yes, sir.

Q. Would you read paragraph 4?

A. I referring that the contents of this Exhibit A and B are true and correct.

Q. And when you wrote that particular paragraph where you signed the affidavit which contained that particular paragraph, did you understand what number 4 meant?

A. Yes, sir.

(p. 16) Q. What did it mean to you?

A. That this is a correct statement made by me.

MR. SEITZ: At this time I'd like to offer into evidence the affidavit and the attachments, which I've presented to Mr. Kekona and he's identified.

Mr. Yamamoto says, no objection, Your Honor.

Mr. Yamamoto says, no objection, Your Honor.

THE COURT: All right. The Court at this time will receive it into evidence, the Petitioner's Exhibit Number 2.

MR. SEITZ: I have no further questions.

This is cross-examinations by Mr. Yamamoto.

Q. Mr. Kekona, why did you send a letter to Mr. Seitz on October 1?

THE COURT: Just a minute. I believe Mr. Kekona has a question.

A. Can I get a glass of water?

The Court says, Dwight, could you get a glass of water for the witness. Thank you.

Mr. Kekona, you ready to proceed?

A. Yes, sir.

THE COURT: All right. Mr. Yamamoto.

Questions resumed by Mr. Yamamoto.

Q. Mr. Kekona why did you send that letter of October 31, 1928 to Mr. Seitz?

(p. 17) A. Because I feeled that was my way to come home, you know, to see my parents.

Q. And you remember what you wrote to Mr. Seitz in that letter?

A. That's right, sir.

Q. Was that you wrote to Mr. Seitz on October 31, 1982, in fact true?

A. No.

Q. That was a lie?

A. Yeah.

Q. Now when Mr. Seitz came to see you on November 6, 1982, and when he had to tape recording and he was playing the tape while you and he were talking, were you telling the truth to Mr. Seitz or were you lying to him?

A. I was lying to him.

Q. What you are saying is that the exhibit that Mr. Seitz showed you, so that when you look at Petitioner's Exhibit 2 in evidence, the letter, which is marked as Exhibit A on the bottom, what was contained in that letter is a lie?

A. Yes, sir.

Q. So when you say that you lied about everything, you were in fact lying?

A. Yeah.

(p. 18) When you had this conversation with Mr. Seitz on November 6, 1982, when you told him that John Lincoln was involved in the murder – murders in Honokowai, that was also not true?

A. Yeah.

Q. What was the purpose of you telling Mr. Seitz these lies?

A. To come home.

Q. And okay, let knee ask you this. When were you shipped to the Mainland?

A. In 1980.

Q. And for two years you had not been back to Hawaii, is that correct?

A. Yes.

Q. When you say that you wanted to come home, was there a reason for you wanting to come home?

A. Come home, see family and see what, you know, my home.

Q. When you signed this affidavit, the first page of the document, which has paragraph number 4, I reaffirm that the contents of Exhibit A and B are true and correct, is that true or false?

A. Well, that's what it says here.

Q. Yeah, but when you signed it, did you know that?

A. That's a lie.

Q. The letter and the affidavit, the transcript of the taped conversations were false?

A. Yeah.

Q. So you lied in the affidavit too?

A. That's right.

Q. Your testimony then, Mr. Kekona, is that at the time of the trial back in 1980, you testified and you testified to the truth, is that correct?

A. That's correct.

Q. And this so-called retraction, this affidavit and the exhibits that are before you now, that's a lie?

A. That's a lie.

Mr. Yamamoto states, he has no further questions.

THE COURT: Mr. Seitz?

He is allowed to cross-examine. One moment please, Your Honor.

Dwight, are you ready?

These are questions by Mr. Seitz.

Q. Mr. Cardoza say that they would do anything for you for coming in here this morning and giving the testimony you've given?

A. No.

(p. 20) Q. Did Mr. Cardoza say that he would do anything to you for lying to this Court in an affidavit?

A. I got three life, two 20's, one 10, one five, just drop 'em in the back.

MR. SEITZ: May I have a minute.

Questions continued by Mr. Seitz.

Q. This Detective Cordeiro who we've been talking about, he's the same Detective Cordeiro who you first made your statement to in this case, in which you incriminated Mr. Lincoln, is that right?

A. That's right.

Q. He just happened to be there at the right time at the right moment, isn't that right?

Mr. Yamamoto objects. Objection, Your Honor, argumentative.

THE COURT: Sustained.

Questions by Mr. Seitz.

Q. Mr. Kekona, in your statement to me, which was tape recorded, in which you earlier said in the affidavit were true, you stated that – I'll read you the question.

"Did you see John on Maui as you testified, did he come over and visit with you one time in April of 1978?"

And the answer you gave was, "He came over but it wasn't for this hit thing." You remember that (p. 21) answer?

A. Yes.

Q. And you remember tell me that Mr. Lincoln came over to Maui to talk to you about some marijuana dealings that you and he had, do you recall that?

A. Yes.

Q. Is it true that you and Mr. Lincoln had some marijuana dealings?

A. No.

Q. You had none?

A. No.

Q. Did you ever have any dealings with Mr. Lincoln about marijuana?

A. No.

Q. Did you ever ask Mr. Lincoln to get you any marijuana?

A. No.

Q. Do you remember testifying under oath in the trial of this case, don't you, Mr. Kekona?

A. Yes.

Q. Do you remember testifying that in response to a question by Mr. Yamamoto, Mr. Lincoln came to visit his

brother at Oahu prison while you were there, and you ran out and asked if he could get you some marijuana?

A. He owed me that.

(p. 22) Q. Do you remember that testimony?

A. That's right. He owed me that. Did you remember that too?

Q. So when you just –

The Court states, all right. I am going to stop both of you at this time. You recall I said at the beginning of this hearing. I expect a question, a pause, time for Mr. Kekona to answer and then the next question.

MR. SEITZ: I'll do my best.

The Court states, all right. Now, start over again. Could you repeat your question again, Mr. Seitz?

Question by Mr. Seitz.

Q. Let me ask you another question, Mr. Kekona. A moment ago I asked you, as you sit there under oath, whether you ever asked Mr. Lincoln to get marijuana for you. And you said no. Do you recall saying that here this morning under oath?

A. You are talking about the airport, right on.

Q. Can we have the question the answer read back.

The Court states, I am not sure what question you are referring to.

MR. SEITZ: The initial question when I asked Mr. Kekona if he had ever asked Mr. Lincoln to get (p. 23) marijuana for him.

THE COURT: All right. I don't think there's any dispute that his answer to that was no.

MR. SEITZ: Okay.

The Court states, you want to ask your next question, please?

Questions by Mr. Seitz.

Q. Did you ever ask Mr. Lincoln to get marijuana for you, Mr. Kekona?

A. Okay. Are you talking about the prison?

Q. Ever.

A. Wait.

THE COURT: I am going to interrupt here. I think it's only fair for the witness if you make it clear the time frame you're talking about. And Mr. Kekona, what Mr. Seitz is saying now, in your whole lifetime. In other words, ever. Didn't matter when, but ever. Did you ask Mr. Lincoln for marijuana or for him to get you some marijuana?

A. In the prison yeah.

THE COURT: Okay. Fair enough. Next question.

Q. And you said he owed that you?

A. Yes, sir.

Q. Why did he owe it to you?

(p. 24) A. Because the contract was 10,000 and I only got paid so much. I still didn't get that much money until today.

Q. Were you and Mr. Lincoln involved in any marijuana deals over here on Maui?

A. No.

Q. You were involved in planting and selling marijuana in April 1978, weren't you?

Mr. Yamamoto objects. Objection, Your Honor, irrelevant.

MR. SEITZ; He testified to it at the criminal trial.

MR. YAMAMOTO: What is the relevance of this with regard to whether this witness is telling the truth now with regard to his incantation?

MR. SEITZ: It's in his affidavit, and I'm questioning him on the contents of his affidavit.

The Court indicates, I am going to allow the question.

Mr. Kekona, do you remember the question?

A. Yes.

THE COURT: Okay,

A. Yeah. I know I had half acre.

Questions by Mr. Seitz.

Q. I believe you testified at the criminal (p. 25) trial you were involved in a hui, isn't that what you said?

A. That's right.

Q. With other people?

A. That's right.

Q. And weren't you involved with John Lincoln selling and distributing some of that marijuana for you?

A. He was not selling nothing for me, and he wasn't working for me. If anything, he owes me.

Q. Wasn't John Lincoln selling and distributing marijuana for you that you grew in Maui in April of 1978?

A. I had my own hui to sell my own.

Q. and was John –

A. So why do I need John Lincoln?

Q. What was your relationship with John Lincoln in April of 1978?

A. For a contract hit.

Q. That's the only relation you had with him?

A. That's the only relation.

Q. Did you talk with Mr. Lincoln on March of 1978?

Mr. Yamamoto objects. I'm going to object to that as being irrelevant.

THE COURT: Mr. Seitz?

Mr. Seitz says, yes I am going to show that (p. 26) there was an ongoing relationship from the time that Mr. Kekona was released from from Habilitat, with Mr. Lincoln well before any event having to do with this particular hit. Contrast to what he's just testified, that that was the only relationship he had with Mr. Lincoln.

THE COURT: I'll allow the question, Mr. Kekona. You want him to repeat it?

A. Yeah.

The Court says, Mr. Seitz, would you repeat your question?

Q. Were there any telephone conversations between yourself and Mr. Lincoln in March of 1978?

A. In March, I think I was in Honolulu with him.

Q. That's right.

A. And the only contact through the phones I had was in April.

Q. Did you see Mr. Lincoln in March of 1978?

A. Yeah, I was right in the same car and in the same house.

Q. He was helping you get jobs, wasn't he?

A. Supposedly.

Q. And then you came back to Maui in April of 1978, is that correct?

A. That's right.

(p. 27) Q. And didn't you stay in touch with Mr. Lincoln?

A. No.

Q. You didn't have any contact with him until he called you about this hit?

A. That's right.

Q. Was anybody else involved in these offenses, these killings that occurred, besides you and Patrick Hawkins?

MR. YAMAMOTO: Objection, Your Honor, irrelevant.

THE COURT: I feel now we're getting to areas of irrelevance for purposes of this hearing, Mr. Seitz. You're going to have to make another offer of proof to show the relevance.

MR. SEITZ: Well, again, I'm examining him on page B4 of the exhibit attached to his affidavit, and on the statements which he now claims are not true.

THE COURT: All right. I'll allow that question, Mr. Kekona. You remember the question?

A. No.

THE COURT: Mr. Seitz, would you repeat it, please?

Question by Mr. Seitz.

Q. Was anybody else involved in these crimes, (p. 28) these shootings for which you were convicted, other than you and Patrick Hawkins?

A. John Lincoln.

Q. Was anybody else involved?

A. No.

Q. Did you go to the apartment of Mr. Warford, Mr. Blue, and Miss Savage to rob them?

A. To make them look like a robbery, but was one contract hit.

Q. You were going to kill them, there was no question in your mine?

A. That was the job set up for me, to kill them.

Q. Was that what you went there to do?

A. That's right, and I did that.

Q. That's what both you and Patrick Hawkins were there for?

A. That's right.

Mr. Seitz says, I have no further question.

That concludes the reading.

[Material Deleted In Printing]

(Following proceedings were held in open court.)

THE COURT: Ladies and gentlemen, we have completed the evidentiary phase in this case. The Court has a lot of matters that have been piling up because of the length of this trial, which were set for tomorrow and Friday. And also, both attorneys and the Court have quite a bit of homework to do in preparing the instructions, which will be given to you.

So because we have a couple of days of extra work, we're going to recess the trial until Monday morning at 8:30. At that time, you will hear the final arguments of both sides and receive the Court's instructions.

I want you, despite the fact that you have heard the evidence, to keep an open mind until you have (p. 38)

been instructed in the law that is applicable to this case. It is very important between now and Monday morning that you not discuss the case with anyone nor permit anyone to discuss it with you. If anyone attempts to discuss it with you, you should refuse and report that to me. You should not go to any of the places mentioned by the evidence, you should not read or listen to any media account of this case.

As you know, the reasons for all of this is that your decision must be based strictly on the evidence that's been received in this room and on the Court's instructions. Expect Monday morning, when you get here at 8:30, that both sides will proceed with their final arguments.

The Court will then instruct you and the law applicable to this case, and you should be into your deliberation sometime during the middle of the day on Monday.

Is there anything else?

MR. BRYANT: Nothing by the State.

THE COURT: I would like to see counsel after this, and I will see the jurors on Monday morning at 8:30.

(Court was adjourned until Monday, February 6, 1989 at 8:30 a.m.)

(p. 39) STATE OF HAW.)
)
COUNTY OF MAUI)

I, GLORIA T. BEDIAMOL, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 39 inclusive comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 5th day of May, 1989.

/s/ Gloria T. Bediamol
GLORIA T. BEDIAMOL, RPR,
CSR #262
Official Court Reporter

APPENDIX "G"

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAII

JOHN K. LINCOLN, Petitioner vs. STATE OF HAWAII, Respondent.	)	Criminal No. 5720 AFFIDAVIT OF ANTHONY K. KEKONA, JR.: EXHIBITS A AND B

AFFIDAVIT OF ANTHONY K. KEKONA, JR.

BOROUGH OF LEWISBURG STATE OF PENNSYLVANIA	)	SS.

ANTHONY K. KEKONA, JR., being first duly sworn on Oath, deposes and says:

(1) I presently am confined in the United States Penitentiary, Lewisburg, Pennsylvania.

(2) On October 31, 1982, I sent a letter to Attorney ERIC A. SEITZ, a true copy of which is attached to my affidavit as Exhibit A.

(3) On November 6, 1982, Mr. SEITZ visited me at the U.S. Penitentiary, Lewisburg, Pennsylvania, and our conversation was tape recorded. A true and correct transcript of the conversation is attached to my affidavit as Exhibit B.

(4) I reaffirm that the contents of Exhibits A and B are true and correct.

/s/ Anthony K. Kekona, Jr.
ANTHONY K. KEKONA, JR.

Subscribed and sworn to before me
this 16th day of November, 1982.

/s/ Illegible
Notary Public

EXHIBIT A

Anthony Kekona N002-08
P.O. Box. 1000
Lewisburg, Pennsylvania
17837

Oct. 31, 1982.

Attorney At Law
Mr. Eric Sietz
Washington D.C. 20012

Dear Sir,

I'm writing to let you know that I want Mr. John K. Lincoln released from Prison. I tried writing to you in Hawaii and calling you.

Now I tried about everything and I know about Perjury and I don't care.

Please respond to my letter as soon as possible and let me know what I can do to help.

If you want to, I'll see you in Person here at Lewisburg. Now Please Stamp confidential on the Mail when you write. Thank you for your time.

Yours truly,
Anthony K. Kekona Jr.

TRANSCRIPT

ERIC A. SEITZ [ES]

ANTHONY K. KEKONA, JR. [AK]

ES: Tony, today is Saturday afternoon, November 6th, and it's about 1:50 in the afternoon, and I'm here – just you and I – we're in a booth in the visiting room at Lewisburg Prison, and I'm here because I got a letter from you, right?

AK: Right.

ES: Let me just show you the letter. The letter was dated October 31st, and it's addressed to me. Is that the letter that you wrote to me?

AK: That's right.

ES: OK, and that's your signature on it?

AK: Yeah.

ES: OK. Now, did I or anybody else talk to you about writing this letter?

AK: No.

ES: When's the last time you and I had any communications, do you recall?

AK: '78 or '79.

ES: Well, the trial was in 1980, when you testified. Have you seen me since then?

AK: No.

ES: We haven't had any communications since then.

AK: No.

ES: Now, when you wrote this letter, had anybody talked to you about writing this letter for him?

AK: No.

ES: Did anybody threaten you or anything?

AK: No.

AK: No.

ES: Why did you write it?

AK: Because I feel that an innocent man is in jail, and, uh, because of my statement, I went put him away, and I don't feel it's right; that, the man didn't hire me, you know? John K. Lincoln, you know? And I don't feel it's right that what I did, and I want the man out of jail.

ES: Well, why did you say in your statements to the police and then in testimony at trial that John had hired you?

AK: Because he made me mad. Because he didn't want to help me. And things like that. I feel, you know, he just never like try to help me so, so I try to cross him too. And he was never involved in this, this thing you know.

ES: Well, after this incident happened, when you went to Honolulu, did you see John Lincoln then when you were running?

AK: Yes.

ES: Did you think at that time that John might have set you up to be captured by the police?

AK: That's what I feel inside my heart, yeah.

ES: And why do you feel he might have done that?

AK: Just because, only him knew where I was, and he could have been my friend and turned me in, you know?

ES: Well, let me ask you this. You said he had nothing to do with this incident at all.

AK: No.

ES: Did you have some phone conversations before it happened?

AK: Yes.

ES: Did you see John on Maui as you testified; did he come over and visit with you one time in April of 1978?

AK: He came over but it wasn't for this hit thing.

ES: What was it for? Can you tell me?

AK: He just came over to see if I had some marijuana like that.

ES: And was that what the phone conversations were about?

AK: Yes.

ES: Now, you know that if you take back or change your testimony at this point in time you're going to have to testify? Do you understand that? Do you want to testify?

AK: Yeah, I want him out of jail. I want to testify, in my behalf and his behalf.

ES: Are you doing this because this will get you an opportunity to testify in Hawaii or are you doing it because you believe what you're saying now?

AK: I believe what I'm saying.

ES: And nobody's threatened you or anything?

AK: No.

ES: Now, are you prepared to tell the court what did happen?

AK: Yes.

ES: Are you able to tell me now what did happen if it didn't involve John Lincoln?

AK: Yes.

ES: Well, why don't you tell me as much as you feel comfortable telling me. What actually did happen in connection with these shootings?

AK: Well, I went over to rob the people, you know, and to get what I wanted I killed them and uh, I wanted the dope they had and the money. They had money with them and I set it up where to look like John did it, you know, like John went hire me and I got mad 'cause he never come through with this marijuana deal and he had uh, he wasn't involved in none of this hit that I

ES: Well, you testified that John Lincoln gave you some pictures.

AK: Right.

ES: Remember that?

AK: Right.

ES: And he drew you a diagram of some kind.

AK: Right.

ES: Remember that?

AK: Right.

ES: Did that happen?

AK: No.

ES: Did somebody else give you some pictures?

AK: Not really.

ES: Well, are you prepared to tell me, were there any pictures involved?

AK: No.

ES: Did somebody else hire you?

AK: No.

ES: Was anybody else involved in this other than you and Hawkins?

AK: Just me and Hawkins.

ES: Now Hawkins said he thought that there was somebody else involved who hired you. Why would he have said that?

AK: Because of what I told him.

ES: When did you tell him something?

AK: Well, then I was preparing to rob these people.

ES: Do you remember what you told him?

AK: Yeah, that I was going rob these people and he was interested in helping me, so he got me a gun and we used his jeep.

ES: Because you said you think he wasn't involved, is that the only reason?

AK: I not thinking that he's not involved. He's not involved at all.

ES: And is that the only reason you want him out of jail?

AK: Yeah. Because I lied and I no feel good inside for lying like that.

ES: And you also know that what you're telling me now is that essentially you committed perjury?

AK: That's right.

ES: You understand that?

AK: Right.

ES: And you wrote in your letter you said you really don't care about that, you want to set it right?

AK: Right.

ES: Is that the way you feel today?

AK: That's right.
